

MEMORANDUM

From: Code 1823/DEC
To: Distribution

Subj: SETTLEMENT AGREEMENT FOR STIPULATED PENALTIES AT NETC
NEWPORT

Encl: (1) EPA letter dated June 8, 1995

1. The assessment of stipulated penalties has been settled with the signed settlement agreement forwarded for your information per enclosure (1).

2. Settlement includes the following:

- a. Cash Payment of \$30,000
- b. Formal Partnering Session for \$10,000
- c. Supplemental Project for \$90,000

3. The supplemental project consists of removing approximately 1,500 cubic yards of sand blast grit at Derecktor Shipyard for disposal at McAllister Point Landfill. Scope of project is attached to the settlement agreement.

Debbie Carlson

Debbie Carlson

Distribution:
Code 182
Code 1823
Code 1822/TB
Code 1831/SH
Code 4023/CD
Team C1

Stipulated Penalty
Naval Education and Training Center (NETC)
NEWPORT, RI

EPA Region I assessed a \$260,000 penalty for non-compliance with the March, 1992 Federal Facility Agreement (FFA) for the installation.

EPA contended that the draft remedial investigation (RI) report was submitted late.

The draft RI reports for the McAllister Point Landfill and the old fire fighting training area were submitted on 14 Feb 94 and 31 Mar 94 respectively, as required by the schedule in the FFA. EPA judged them to be incomplete because they didn't include ecological risk assessments. The draft reports did contained the ecological risk data, but assessment of the ecological risk had not been actually been made. Navy submitted ecological risk assessments acceptable to EPA on 30 May 94. Although the originally scheduled submissions were draft documents, EPA judged them to be late for the two to three months they were being rcvised to include assessment of ecological risk. Navy's position was that the omissions were administrative in nature and should have been allowed to be corrected during the normal review phase of the draft documents.

After a year of negotiations on 26 Jun 95, Navy, EPA and the state of Rhode Island agreed to a three part settlement. Navy reluctantly agreed to the settlement, but felt it was the best we could do, and after a year of negotiations, it was necessary to put it behind us and get on with building a stronger partnership. The parties agreed that the Navy would;

- a. Pay a cash penalty of \$30,000 to EPA. This amount is a specific line item in the FY 1997 Navy cleanup budget request, in accordance with the FFA.
- b. Arrange and pay for (\$10,000) a formal partnering session among the parties. This was successfully completed in Aug 95 with very positive results.
- c. Remove sandblast grit from the Direcktor Shipyard site at NETC. This was completed in Sept 95 at a cost of \$1,500,000, accelerated from the out-year budget

254 K for Sandblast



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Pages 3

FAX FOR: OLA, LCDR NAN POTTS

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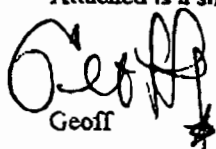
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Subj: NETC NEWPORT STIPULATED PENALTIES

Nan,

Attached is a short paper on the NETC Newport stipulated penalties. I also e-mailed it to you a few minutes ago.


Geoff

Copy to:
NAVFAC 41
NORTHDIV 18



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The assessment of stipulated penalties at NETC Newport was not the result of bad faith on the part of the Navy. Nor did it represent any form of misconduct. It was a misunderstanding of the requirements for ecological risk assessments.

There was no domino effect on the overall cleanup program at NETC. In fact, the work required by the settlement at the Director Shipyard site turned out to be very beneficial for all concerned. It met the regulator's desire for the work and it provided fill (contaminated, but not hazardous) to help bring the McAllister Point Landfill waste layer up to grade for construction of a cap.

None-the-less, the \$30,000 cash penalty to EPA represents \$30,000 not available for actual cleanup work.

REGION I GUIDANCE ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS

NOVEMBER 5, 1993

REGION I GUIDANCE ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS

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REGION I GUIDANCE ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS

I. INTRODUCTION

In keeping with national EPA priorities, Region I is committed to increasing benefits to the environment, beyond those required by law, through the enforcement actions that we take against violators of environmental laws. Current Agency policy permits the granting of credit for "supplemental environmental projects" ("SEPs") against assessed penalties, and it specifically encourages the incorporation of projects that result in pollution prevention or pollution reduction into enforcement settlements. In order to increase the number of supplemental environmental projects resulting in pollution prevention undertaken in the Region, the Region has developed the following guidance document.

This guidance¹ is intended to supplement and summarize existing Agency policy on the use of supplemental environmental projects in Agency consent orders and decrees. In particular, it addresses issues raised in two Office of Enforcement memoranda signed by James M. Strock, "Policy on the Use of Supplemental Environmental Projects in EPA Settlements," dated February 12, 1991 (the "Feb. 12, 1991 Policy"), and "Interim Policy on the Inclusion of Pollution Prevention and Recycling Provisions in Enforcement Settlements," dated February 25, 1991 (the "Feb. 25, 1991 Policy"). In the event a discrepancy between the Regional and Headquarters directives arises, Headquarters guidance will control.

The guidance highlights legal and technical issues that are raised by the inclusion of SEPs as a condition of settlement in enforcement actions. It is thereby intended to facilitate the inclusion of such projects, particularly those that require facilities to undertake pollution prevention measures, in our settlements, while preserving effective deterrence and accountability for compliance and environmentally beneficial results.

Supplemental environmental projects included as conditions of settlement in enforcement or other penalty actions are a means for violators to mitigate the cash penalty paid to the United

¹This document is intended solely for the guidance of Government personnel. It is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with and change this guidance at any time without public notice.

States for environmental violations.² The credit given is based upon the amount to be spent by the violator on the project, in addition to other factors discussed below.

II. GENERAL REQUIREMENTS FOR SEPS

A. Public Benefit: The project must be beyond statutory requirements, and the majority of the project's benefit must accrue to human health, safety and the environment, rather than to the benefit of the violator. The project should not be something the violator could reasonably be expected to do solely as a part of sound business practice. However, the Agency may make an exception for projects incorporating pollution prevention measures that could also reasonably be done solely for business purposes.

B. Nexus: There must be an appropriate relation, or "nexus," between the benefit produced by the SEP and the violation that is the subject of the enforcement action. According to Headquarters guidance, the nexus may either be vertical (in which case Headquarters approval is not required for the SEP) or horizontal (in which case Headquarters approval is required for the SEP), as described below.

1. Vertical Nexus

A "vertical" nexus exists when the SEP operates to reduce pollutant loadings of the same pollutant in the medium that was the basis of the violation in the enforcement action. (Feb. 12, 1991 Policy, p.6) In order to qualify as an SEP, the reduction made by the project must be beyond that required by law. Such reductions may be made at the facility responsible for the underlying violation, at a facility upstream on the same river, or through the alteration of a production process at a facility handling a portion of the manufacturing process antecedent to that which caused the violation, such that discharges of the offending pollutant are reduced or eliminated.

2. Horizontal Nexus

A "horizontal" nexus exists when the SEP involves either (a) relief for a different medium at a given facility or (b) relief for the same medium at a different facility. In such cases, the nexus requirement is only met if the SEP would

²While such projects will not, in most instances, be appropriate for use in Superfund cases, in those Superfund cases involving the payment of a penalty, the possibility of including an SEP as a condition of settlement should be considered.

reduce the overall public health or environmental risk posed by the facility responsible for the violation or reduces the likelihood of future violations substantially similar to those that were the basis of the enforcement action. (See Feb. 12, 1991 Policy for examples of SEPs with "horizontal" nexus, p.7) Headquarters approval is required for SEPs with horizontal nexus to the violation.

C. Types of Projects: Six categories of projects will be considered as potential Supplemental Environmental Projects, subject to meeting the additional criteria set forth in this guidance. The following list generally sets out the categories of acceptable projects in order of priority; however, such priority is subject to the circumstances of the case or the particular requirements of the program involved.

1. Pollution Prevention

A project that substantially reduces or prevents generation of pollutants through use reduction or closed-loop processes. Innovative recycling is considered pollution prevention if pollutants are kept out of the environment in perpetuity. Reducing the use of toxic chemicals and replacing solvents with less toxic cleaners are examples of pollution prevention. See the definition of pollution prevention in "EPA Definition of 'Pollution Prevention,'" memorandum issued by F. Henry Habicht II, dated May 28, 1992. (Attachment I)

2. Pollution Reduction

A project that brings the facility substantially past the point at which it achieves compliance with existing discharge limitations. Improved operation and maintenance, more effective end-of-pipe technologies, scrubbers, recycling of residuals at "the end of a pipe," alarm and recovery systems for accidental releases, and accelerated compliance projects are examples of pollution reduction.

3. Remediation Project

A project that not only repairs the damage done to the environment as a result of the violation, but also goes beyond the repair to enhance the environment. Credit may not be granted for a project that is otherwise available to EPA as injunctive relief under the relevant statute.

4. Environmental Audits

Auditing practices designed to correct the environmental management practices that are leading to recurring or

potential violations. Such an audit must be in addition to audits undertaken as a good business practice or in order to comply with state toxic use reduction laws.

5. Enforcement-related Environmental Public Awareness Project

A project that may include publications, broadcasts or seminars. The company must announce the connection of the project to the enforcement action, and the project should be related to the importance of, or disseminate technical information about, complying with environmental laws. Such a project must go beyond merely training the employees of the violating facility how to comply with environmental laws.

6. Contingency Planning/Safety/Emergency Response Donations

Credit may be granted for donations of equipment or training to local or state entities where such donation reduces the risk of chemical releases to the community or promotes the reduction of chemical releases at facilities through enhanced planning, training or acquisition of hazardous materials response equipment.

D. Timing of Project: The SEP must be undertaken in connection with the settlement of the enforcement action. The SEP may not be a condition of another settlement with EPA or other regulator, nor may it be required by federal or other law or regulation. The company may not have initiated, implemented or completed the project prior to the filing of the complaint, although it will not be fatal to the project if background research or a pilot study was previously completed. A significant expansion or enhancement of an existing project may also qualify as an SEP if that expansion or enhancement would not have been undertaken but for EPA's enforcement action.

Where the project is implemented in order to meet statutorily mandated deadlines for eliminating the use or production of particular chemicals (e.g., the Montreal Protocol, which requires the cessation of CFC production by 1995), a case-by-case analysis should be made of the environmental value of early compliance with such requirements.

E. Oversight: An enforceable SEP should not require an inordinate amount of EPA oversight. In general, it is desirable that an SEP require no more than one year to complete, unless special circumstances such as the complexity or long-term nature of the project or inability to pay on the part of the violator dictate otherwise. Where a project requires more than six months to implement, explicit arrangements as to how the project will be

monitored should be developed by the case team.

F. Cash Penalty: Credit for the SEP cannot be applied against the economic benefit portion of the assessed penalty, and an "appreciable" portion of the gravity-based penalty must be collected in the settlement. In addition, the economic benefit to the company of the proposed project cannot cancel the current monetary impact of the penalty.

1. Ratio of Cost to Credit. In calculating the SEP credit, the penalty may not be reduced by more than the after-tax amount the violator spends on the project. In general, a minimum 2 to 1 reduction may be used as a rule of thumb: for every \$2 spent on the SEP, EPA could grant at most \$1 of credit against the adjusted penalty. This rule of thumb relieves the case team of the requirement of calculating the actual after-tax cost of the project.³ The actual credit may often be at a ratio greater than 2 to 1, for example, where \$1 of credit is granted for every \$3 or \$4 spent on the project.

A less than 2 to 1 reduction may be appropriate, however, where (i) the violator is a municipality or non-profit organization (there being no tax benefits to the project to take into account) or (ii) the SEP solely benefits the community at large (e.g., as with a donation of emergency response equipment to the Local Emergency Planning Committee). In the latter case, the consent agreement or decree must contain language expressly acknowledging that such expenditures are not deductible by the violator for tax purposes.

2. Percentage of Penalty. While the amount of credit granted for an SEP is discretionary on the part of the case team, the Region recommends that, regardless of the amount of the potential credit calculated on the basis of the 2 to 1 rule of thumb, the actual credit granted to the company be limited to 50% off the adjusted penalty or settlement amount. In other words, the SEP credit should not exceed 50% of the penalty amount resulting after all adjustments have been made to account for exculpatory evidence, "good faith" negotiation, litigation risk, and the like.

A project that is of extraordinary value to public health or the environment or the financial condition of the respondent may justify a penalty reduction of more than 50%. Conversely, where the SEP is of limited value to public health or the environment (although it still qualifies as an acceptable SEP), a credit of

³To calculate the actual cost of the project, the Agency's BEN computer model may be used, with certain adjustments. Contact Jonathan D. Libber, BEN/ABEL Coordinator (202/260-8777), in the Office of Enforcement for guidance in this use of BEN.

less than 50% should be granted. In any case, however, the monetary penalty to be paid generally should not be reduced to less than the amount of economic benefit realized by the violator plus an "appreciable" portion of the gravity component included in the settlement amount.

The SEP credit should reflect Regional priorities with respect to the environmental benefits of the project, as well as the size of the company, the amount of the penalty, and type and cost of the project. It is anticipated, for example, that the maximum amount of credit (for example, a reduction of 50% or more) will be reserved for pollution prevention projects, and smaller percentage credits will reflect the priority of SEPs set forth on page 3. However, different EPA programs may have special concerns that are addressed by particular types of projects, and such concerns should be taken into account when evaluating the SEP and calculating the SEP credit.

In summary:

A reduction of up to 50% of the amount which the violator would have paid if the settlement did not include an SEP (i.e., the adjusted penalty or settlement amount) may be allowed, with the reduction calculated on a 2 to 1 ratio of dollar expended on the SEP to dollar reduction (or on a 1 to 1 ratio in the case of not-for-profit entities or donations benefiting only the community at large).

In those cases in which the SEP is of extraordinary value to public health or the environment or in which the amount to be expended in carrying out the SEP far exceeds any possible credit, a reduction in excess of 50% may be allowed.

It should be noted that if the actual cost of the project exceeds the estimates originally given to the Agency, the settlement agreement will not be renegotiated.

G. Environmental Equity: Region I is committed to promoting and supporting equitable environmental protection regardless of race, ethnicity, economic status, or community. Environmental equity embraces the belief that no segment of the population should bear a disproportionate share of the consequences of environmental pollution. When a violator proposes several possible SEPs, Region I will have a preference for projects that are likely to reduce current or future risks of pollution to those segments of the population bearing a disproportionate share of the consequences of environmental pollution.

III. THE SEP PROPOSAL

During the first settlement negotiation meeting with the Respondent/Defendant, the case team may, if appropriate, furnish a guideline outlining requirements for an SEP proposal (Attachment II). The guideline sets forth the following requirements for an SEP proposal:

A. Description of the Project

A detailed description of the project, including identification of the affected process, media, waste stream or discharge, as well as a technical description of the work to be performed. A detailed description of how, by whom, and when the project will be completed should also be included.

B. Conception of Project

Information pertaining to when the project was first conceived by the company, as well as why the project was proposed. If research was conducted or a pilot project undertaken prior to EPA's enforcement action, a description of such research or pilot project should be provided, including when the work was performed and why the currently proposed project was not then implemented.

C. Itemized Costs

A projected budget for the project, including a detailed breakdown of equipment and other capital costs, as well as labor costs. (A proposal from a supplier or consultant should eventually be obtained in order to confirm the estimated cost of the project.) Consultants who will perform the work, if any, should be identified, and any contemplated allocation of labor costs between consultant and company employees should be described.

D. Projected Savings to Company

An estimate and itemization of the savings to the company that will result from the project. A calculation of the payback period (i.e., the time that it will take for the company to recoup the cost of the project through the savings that it achieves as a result of the project) should be included.

E. Quantification of SEP's Environmental Benefit

An estimation of the projected percentage and quantity of reduction of the pollutant, expressed in pounds/year, or a description of the benefit to the general public or the environment. (For example, the elimination of 2,500 pounds of 1,1,1-trichloroethane for off-site disposal; the elimination of 1,500 pounds of emissions by replacing a solvent; or an expanded

capacity for local emergency planning entities to respond to hazardous materials emergencies through donations of needed equipment.)

After the proposal is approved, EPA may require a more detailed workplan to be submitted, including a scope of work and a schedule of implementation. The workplan should include, if the project will take more than six months to complete, milestone events and interim reporting deadlines. This workplan will be subject to EPA approval.

It should be pointed out to the violator that, unless a business confidentiality claim is made pursuant to 40 C.F.R. § 2.203(b) at the time of a submittal, the information submitted to EPA may be made available to the public without further notice to the company.

IV. TECHNICAL CRITERIA FOR SEPs

A. Evaluation of SEP Potential

Where the violating facility is a potential candidate for an SEP that involves pollution prevention, pollution reduction or remediation, the following questions will help to stimulate ideas for projects or assess the projects proposed:

1. Has the entire facility been evaluated to determine all potential areas for SEPs?
2. What in the facility adversely affects human health and the environment most?
 - emissions to air, water, land, etc. (both inside and outside the facility)
 - transfers off-site to landfills, incinerators, etc.
3. What projects could eliminate some of the adverse affects?
4. Will the proposed projects:
 - eliminate a toxic/hazardous substance?
 - reduce the use of a toxic/hazardous substance?
 - transfer any chemicals to other media or produce any detrimental cross-media effects?
5. Are these projects going to incorporate the latest, technologically proven equipment and practices?

B. Examples of Pollution Prevention

The Region views product changes and process changes as among the most desirable types of SEPs, insofar as they result in the elimination or prevention of pollution at the source rather than after damage has occurred. Such projects are often the most cost-effective way of mitigating the effects of pollution and can save companies large amounts in disposal costs and potential liabilities.

1. Product Changes

Product changes are changes made in the composition or use of the intermediate or end products. These changes are performed by the manufacturer with the purpose of reducing waste from manufacture (inputs), use, or ultimate disposal of the products.

Examples of product changes are:

- Eliminating lead as a stabilizer in plastics.
- Using recycled material.
- Using renewable natural resource materials.
- Using water-based inks instead of solvent-based ones.
- Producing goods and packaging reusable by the consumer.
- Manufacturing recyclable final products.
- Producing more durable products; increased product life.

2. Process Changes

Process changes are related to how the product is made. They include input material changes, technology changes, and improved operating practices. Such changes reduce worker exposure to pollutants and reduce potential environmental releases during the manufacturing process.

Examples of process changes are:

a. Input Material Changes

- Stopping use of heavy metal pigment.
- Using a less hazardous or less toxic solvent for cleaning.
- Purchasing raw materials that are free of trace quantities of hazardous or toxic impurities.
- Purchasing raw materials that are non-hazardous or non-toxic.

b. Technology Changes

- Changing to mechanical stripping or cleaning devices to avoid solvent use.
- Using more efficient motors.

- Installing speed control on pump motors to reduce energy consumption.
- Changing from traditional painting to a powder-coating system.
- Installing in-process reuse or recycling systems.

c. Improved Operating Practices

- Training operators in more efficient operations.
- Covering solvent tanks when not in use.
- Segregating waste streams to avoid cross-contaminating hazardous and non-hazardous materials.
- Improving control of operating conditions (e.g., flow rate, temperature, pressure, residence time, stoichiometry).
- Improving maintenance scheduling, recordkeeping or procedures to increase efficiency.
- Stopping leaks, drips, and spills.
- Using drip pans and splash guards.
- Building contingency systems to capture or recover chemicals that are accidentally released.

V. APPROVALS AND IMPLEMENTATION

A. Approvals

After the case team determines that an SEP proposal meets the guidance criteria, further approvals may be needed. If a project will affect another media, consultation should be made with the program associated with that media prior to acceptance. Additionally, cross-regional approval may be necessary if the project is proposed at a facility in another Region.

Where there is "horizontal" nexus between the violation and the SEP, and/or if the case is judicial, approval by the Office of Enforcement of the SEP must be obtained. Appended to this guidance as Attachment V is a checklist for the points that must be addressed in a request for OE approval of the SEP. Even though OE's review is theoretically limited to the adequacy of the nexus, providing the other data in the checklist enables the Agency to keep track of how the policy is being implemented in all the Regions.

If Headquarters approval is not required for the SEP, the executive summary or penalty justification memo for the consent agreement should contain a detailed explanation of how there is vertical nexus between the violation and the SEP.

If the project involves pollution prevention, it is recommended that a pollution prevention contact in the affected media be consulted prior to acceptance of the project. Consultation with

the Region's multi-media SEP advisory body, if any, may be appropriate for complex or problematic projects.

B. Implementation

Appropriate implementation of the accepted project is assured by including specific provisions in the settlement document. The following is a list of possible requirements and/or conditions which may be needed to implement the project through inclusion in the settlement document.

C. Settlement Document Provisions

The case team should consider inclusion of the following types of provisions in any consent agreement or consent decree which incorporates an SEP into the settlement. (Examples of such provisions, as well as other provisions relating to the SEP, are set forth in Attachment III to this guidance.)

1. The SEP proposal or a workplan may be incorporated as an attachment to the Consent Agreement, detailing the scope of work and schedule for implementation, including milestone events, interim reporting requirements and completion date.
2. If the use of the SEP's substitute chemical must be discontinued for some reason, the replacement chemical may not be more toxic than the agreed-upon chemical.
3. Documentation of costs must be submitted to EPA.
4. Certifications:
 - a. The company must certify that the project is not being implemented in response to any other enforcement action and is not required by any other law, agreement or contract. The respondent may not be receiving a credit or grant from EPA or any other entity in connection with the project.
 - b. All submissions made in connection with the SEP and completion of the project must be certified by a corporate officer of the respondent.
5. EPA's approval of the project does not represent an endorsement of the equipment or technology chosen. EPA will in its sole discretion determine if the goal of the project has been achieved.
6. EPA may inspect the facility at any time to determine compliance with the terms of the Consent Agreement.

7. The company should agree to implement or use the SEP for a minimum length of time (e.g., one year), during which time the facility is not to reinstitute use of the eliminated chemical.

8. The case team should consider the appropriateness of assessing stipulated penalties, or recovering some portion or all of the original credit granted for the SEP, for the failure to implement or complete the SEP in a timely manner as required by the terms of the settlement document, or if expenditures do not reach required levels.

9. The case team should consider the appropriateness of assessing stipulated penalties, or recovering some portion or all of the original credit granted for the SEP, for the failure of the SEP to accomplish projected pollution prevention or pollution reduction objectives.

10. Public statements made by the company about the SEP must disclose that the project was undertaken in connection with the settlement of an enforcement action brought for violation of environmental law.

11. If a 1 to 1 reduction has been given to offset equipment donation expenditures, a statement should be included stating that the expenditures are not deductible for federal tax purposes.

12. A force majeure provision with respect to delays affecting implementation of the project should be included only if the defendant insists on it, not as a matter of course.

Note: A credit project should not be described as a "penalty" or the settlement may be in violation of the Miscellaneous Receipts Act, 31 U.S.C. 3302 (MRA).⁴

⁴The MRA requires that anyone "receiving money for the government from any source deposit the money in the Treasury as soon as practicable," and a broad interpretation of the Act results in an application of its provisions to money both constructively and actually received. If the SEP is termed a "penalty," it could be argued that anything in the nature of a penalty is a sum due the United States and therefore subject to the MRA. However, EPA believes that the agency has sufficient discretionary authority in assessing and mitigating penalties under our statutes to permit the reduction of penalties to reflect expenditures made by defendants for certain environmentally beneficial purposes--provided there is an appropriate nexus to the violation and provided a "significant" cash penalty is paid.

VI. TRACKING AND MONITORING

A. Tracking

Case attorneys are responsible for entering data about the SEP into the Region's Multi-media Enforcement Tickler System (METS). Attached to this guidance as Attachment IV is the METS SEP Form, which must be filled out for each completed enforcement action and included in the concurrence package. The completed SEP Form should also be sent via LAN to the ORC Pollution Prevention Contact at the time the settlement is filed. A description of the SEP Data Fields is also included in Attachment IV, explicating the fields included in the SEP Form. In order to maintain consistency in reporting the data, an ORC contractor will be responsible for transferring the information from the SEP Form to METS.

B. Monitoring

The case team should allocate the responsibility for assuring that all conditions of the consent agreement or consent decree have been satisfied in a timely manner, including all conditions of the SEP. Verification of the SEP should be incorporated into programmatic tracking mechanisms and may be accomplished through the respondent's submission of appropriate documents or certification of completion. However, it is recommended that some percentage of SEPs, particularly those that are long-term, involve significant capital costs, or are unusually complex or unique, be verified through on-site inspection. Such inspections may be undertaken by the initiating program or by other media programs after reviewing data in METS, as outlined below. Verification of the SEP for such cases should occur as soon as feasible following completion of the SEP, but in no case longer than 12 months after completion.

C. Follow-up Inspections

The planning for inspections from all media should include review of the SEP module of METS to ascertain if there is an SEP in place at the facility. If there is, sufficient information should be obtained from the SEP case team in order for the inspecting team to determine, if possible, (a) the status of the SEP and (b) whether the projected SEP benefit was in fact achieved. The results of any such inspection, including anecdotal evidence on the success of the project, should be reported back to the original SEP case team and to the ORC Pollution Prevention Coordinator.

Supplemental Environmental Projects (SEP)
Guidelines for Proposals

A supplemental environmental project (SEP) is a project that produces environmental or public health and safety benefits beyond those required by law, for which a credit may be granted by EPA to offset partially the penalty imposed in the settlement of an enforcement action. You should include in your SEP proposal the following information:

1. Description of the Project

A detailed description of the project, including identification of the affected process, media, waste stream or discharge, as well as a technical description of the work to be performed. Include detailed information describing how, by whom, and when the project will be completed.

2. Conception of Project

Information pertaining to when the project was first conceived by the company, as well as why the SEP was proposed. If research was conducted or a pilot project undertaken prior to EPA's enforcement action, provide a description of such research or pilot project and state when the work was performed and why the currently proposed SEP was not then implemented.

3. Itemized Costs

A projected budget for the project, including a detailed breakdown of equipment and other capital costs, as well as labor costs. (A proposal from a supplier or consultant will eventually be required in order to confirm the estimated cost of the project.) Identify consultants who will perform the work, if any, and include any allocation of labor costs between consultant and company employees, if applicable.

4. Projected Savings to Company

An estimate and itemization of the savings to the company that will result from the project, if any. Include a calculation of the payback period (i.e., the time that it will take for the company to recoup the cost of the project through the savings that it achieves as a result of the project).

5. Quantification of Environmental Benefit

An estimation of projected percentage and quantity of reduction of pollutant, expressed in pounds/year, resulting from the project or a description of the benefit to the general public or

the environment (e.g., expanded capacity for local bodies to do hazardous materials emergency response by contributing to a Local Emergency Planning Commission (LEPC); eliminating 2,500 pounds of 1,1,1-trichloroethane for off-site disposal; or eliminating 1,500 pounds of emissions by replacing a solvent). State specifically what procedures will be used to verify the amount of pollutants reduced (e.g., stack test, sampling, monitoring data, etc.)

After EPA approves the proposal, EPA may require a more detailed workplan to be submitted, including a scope of work and a schedule of implementation. If the project will take more than 6 months to complete, the workplan should include milestone events and interim reporting deadlines. This workplan will be subject to EPA approval.

You may, if you so desire, assert a business confidentiality claim covering part or all of the information submitted, in the manner described by 40 C.F.R. § 2.203(b). You should read the above-cited regulations carefully before asserting a business confidentiality claim, since certain categories of information are not properly the subject of such a claim. Information covered by such a claim will be disclosed by EPA only to the extent, and by the means of the procedures, set forth by 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is received by EPA, it may be made available to the public by EPA without further notice to you.

ATTACHMENT III

EXAMPLES OF SETTLEMENT DOCUMENT PROVISIONS¹ FOR SEPS

[Description of the Project]

(1) Respondent shall undertake a supplemental environmental project (the "Project"), which the parties agree is intended to protect the environment and public health and which is beyond the requirements of existing law. Within thirty (30) days of receiving a copy of this Consent Agreement signed by the Regional Administrator, Respondent shall make all the necessary arrangements to install three alkaline-based aqueous agitation wash systems at the facility in order to replace two freon cleaning units and one methylene chloride cleaning unit at the facility (the "Project"). The Project shall, by April 1, 1993, eliminate the use of freon 113 and methylene chloride at the facility, resulting in an annual reduction of 14,415 pounds of freon 113 and 9,739 pounds of methylene chloride. The Project is more specifically described in the scope of work (hereinafter, the "Scope of Work"), attached hereto as Exhibit A and incorporated herein by reference.

[Solution not more toxic]

(2) Respondent anticipates that the facility will use the cleaning solution known as "Formula 815 GD", supplied by _____ Corporation, in the cleaning systems constituting the Project. In no event, however, shall any substitute cleaner be used in connection with the Project which is more toxic or hazardous than Formula 815 GD, as such characteristics are described on the material safety data sheet (MSDS) for Formula 815 GD attached hereto as Exhibit B.

[Cost of Project]

(3) The total expenditure for the Project shall be not less than \$000,000, in accordance with the specifications set forth in the Scope of Work. Respondent agrees to provide Complainant with documentation of the expenditures made in connection with the Project by _____, 1993.

To the extent that the actual expenditures for the Project do not total _____ thousand dollars (\$000,000), Respondent shall pay to EPA, within 30 days of submission of the certification of completion required by paragraph ____, one dollar (\$1) for every _____ dollars (\$000) [the ratio of reduction in penalty] below _____ thousand dollars (\$000,000) [the projected cost of the Project] that Respondent actually expends for the Project, plus interest at the rate of the United States Treasury tax and loan

¹The provisions set forth in this attachment are examples only. It should be noted that neither the language nor the dates and timeframes used represent Agency or Regional policy.

rate, in accordance with 4 C.F.R. § 102.13(c).

[Certification that Project is not otherwise required]

(4) Respondent hereby certifies that, as of the date of this Consent Agreement, Respondent is not otherwise required, by virtue of any local, state or federal statute, regulation, order, consent decree, permit or other law or agreement, to develop or implement the Project. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, a credit for the Project in any other enforcement action or any grant from EPA or other entity to undertake the Project.

[EPA to judge achievement of goals]

(5) Whether Respondent has complied with the terms of this Consent Agreement and Order through achievement of the elimination of the use of _____ as herein required shall be the sole determination of EPA.

[Milestone requirements]

(6) Respondent shall submit a Project Report describing the Project to EPA by _____, 1993. The Project Report shall contain the following information:

- (i) A detailed description of the installed systems.
- (ii) A description of system operation and performance, including monitoring data and documentation of the elimination of _____.
- (iii) A description of any operating problems encountered and the solutions thereto.
- (iv) Itemized system costs, documented by copies of purchase orders and receipts or cancelled checks.

[EPA right to inspect; Respondent must use Project]

(7) Respondent agrees that EPA may inspect the facility at any time in order to confirm that the Project is operating properly and in conformity with the representations made herein. Respondent agrees that it shall continuously use the alkaline agitation wash systems installed as the Project for not less than one year subsequent to installation, and Respondent shall not reinstate the use of _____ at any time.

[Document retention and certification]

(8) Respondent shall maintain legible copies of documentation of the underlying research and data for any and all documents or reports submitted to EPA pursuant to this Consent Agreement, and Respondent shall provide the documentation of any such underlying research and data to EPA within seven days of a request for such information. In all documents or reports, including, without limitation, the Project Report, submitted to EPA pursuant to this

Consent Agreement, Respondent shall, by its officers, sign and certify under penalty of law that the information contained in such document or report is true, accurate, and not misleading by signing the following statement:

I certify that the information contained in or accompanying this document is true, accurate, and complete.

As to those identified portions of this document for which I cannot personally verify their truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification, that this information is true, accurate, and complete.

[EPA acceptance of Final Report]

(9) (a) Following receipt of the Project Report described in paragraph __ above, EPA will either (i) accept the Project Report or (ii) reject the Project Report and notify the Respondent, in writing, of deficiencies in the Project Report and any additional actions and/or information required to be taken or supplied by Respondent.

(b) If Respondent objects to any EPA notification of deficiency or disapproval given pursuant to this paragraph, Respondent shall notify the EPA in writing of its objection within ten (10) days of receipt of such notification. EPA and Respondent shall have an additional thirty (30) days from the receipt by the EPA of the notification of objection to reach agreement. If agreement cannot be reached on any such issue within this thirty (30) day period, EPA shall provide a written statement of its decision to Respondent, which decision shall be final and binding upon Respondent. Respondent agrees to comply with any requirements imposed by EPA as a result of any such deficiency or failure to comply with the terms of this Consent Agreement and Order. In the event the Project is not installed and operating as contemplated hereby, as determined by EPA, the penalty proposed in the complaint shall be due and payable by Respondent to EPA in accordance with paragraph __ hereof, minus any amounts previously paid pursuant to paragraph __ hereof.

[Failure to Complete Project]

(10) In the event that (i) Respondent fails to comply with any of the terms or provisions of this Agreement relating to the Project or, (ii) notwithstanding anything herein to the contrary, Respondent cannot achieve compliance with the requirements of this Consent Agreement and Order, for any reason whatsoever, by _____, then Respondent shall become liable for the full amount of the penalty proposed in the complaint, minus any amounts previously paid pursuant to paragraph __ hereof. In such event, Respondent shall immediately submit a cashier's or

certified check to the EPA, in the manner specified in said paragraph ____.

[Alternatively, CAO may require additional penalty to be paid pro rata according to the decrease in the actual cost of Project. See item (3) above.]

[Public statements must acknowledge enforcement action]

(11) Respondent hereby agrees that any public or private statement, oral or written, making reference to the Project shall include the following language, "This Project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of the reporting requirements of Section 313 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11023."

[No relief from compliance; no endorsement by EPA]

(12) This Consent Agreement and Order shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit, nor shall it be construed to constitute EPA approval of the equipment or technology installed by Respondent in connection with the Project under the terms of this Agreement.

[No tax deduction for 1 to 1 credit]

(13) Respondent hereby agrees that, in consideration of EPA's granting Respondent a credit against the assessed penalty for the full amount of the foregoing expenditures, said expenditures shall not be deductible for purposes of Federal taxes.

[Force Majeure--if insisted on by respondent]

(14) (a) If any event occurs which causes or may cause delays in the achievement of compliance at Respondent's facility as required under this Agreement, Respondent shall notify Complainant in writing within 10 days of the delay or Respondent's knowledge of the anticipated delay, whichever is earlier. The notice shall describe in detail the anticipated length of the delay, the precise cause or causes of the delay, the measures taken and to be taken by Respondent to prevent or minimize the delay, and the timetable by which those measures will be implemented. The Respondent shall adopt all reasonable measures to avoid or minimize any such delay. Failure by Respondent to comply with the notice requirements of this paragraph shall render this paragraph void and of no effect as to the particular incident involved and constitute a waiver of the Respondent's right to request an extension of its obligation under this Agreement based on such incident.

(b) If the parties agree that the delay or anticipated delay in compliance with this Agreement has been or will be

caused by circumstances entirely beyond the control of Respondent, the time for performance hereunder may be extended for a period no longer than the delay resulting from such circumstances. In such event, the parties shall stipulate to such extension of time. In the event that the EPA and the Respondent cannot agree that a delay in achieving compliance with the requirements of this Consent Agreement and Order has been or will be caused by circumstances beyond the control of the Respondent, the dispute shall be resolved in accordance with the provisions of paragraph __ of this Agreement.

(c) The burden of proving that any delay is caused by circumstances entirely beyond the control of the Respondent shall rest with the Respondent. Increased costs or expenses associated with the implementation of actions called for by this Agreement shall not, in any event, be a basis for changes in this Agreement or extensions of time under section (b) of this paragraph. Delay in achievement of one interim step shall not necessarily justify or excuse delay in achievement of subsequent steps.

ATTACHMENT IV

SEP DATA FORM

*****NOTE:** Press insert key before entering data.
The highlighted data elements are mandatory.

I. FACILITY INFORMATION

FACILITY NAME: _____

ADDRESS: _____
(INCLUDE CITY, STATE, AND ZIP)

ENGINEER: _____ ATTORNEY: _____

DOCKET NO.: _____ FINDS NO. _____

INDUSTRIAL DESCRIPTION: _____

SIC CODE: _____

TYPE OF VIOLATION: _____ (STATUTE AND
SECTION, PLUS BRIEF DESCRIPTION OF VIOLATION)

II. SEP INFORMATION

SEP TYPE: _____ Enter number, select from the categories below.

1. Pollution Prevention
2. Pollution Reduction
3. Environmental Restoration
4. Environmental Auditing
5. Public Awareness Programs
6. Donation to LEPC/SERC

SEP DESCRIPTION: _____

ASSOCIATED MEDIA: _____ (AIR, WATER, LAND)

ASSOCIATED STATUTE(S): _____ (TO WHICH
PROGRAMS DOES THE SEP APPLY - CAA, FIFRA, TSCA, SPCC, etc.)

MULTIMEDIA SEP (Y/N): _____

III. PENALTY INFORMATION

DATE OF CONSENT AGREEMENT/CONSENT DECREE: ____/____/____

PROPOSED PENALTY AMOUNT: \$ _____

ADJUSTED PENALTY AMOUNT: \$ _____

FINAL PENALTY AMOUNT: \$ _____

PENALTY DUE DATE: ____/____/____

ATTACHMENT IV

IV. SEP COST/CREDIT INFORMATION

INITIAL SEP COST: \$ _____ ANNUAL O&M COST: \$ _____
SEP CREDIT: \$ _____ PERCENT REDUCTION: _____
ESTIMATED PAYBACK PERIOD: _____ (YEARS)

V. ENVIRONMENTAL BENEFIT

POLLUTANT: _____
QUANTITY: _____ UNIT: _____ (TONS OR POUNDS/YEAR)
PERCENT REDUCTION: _____
MEDIUM: _____ (AIR, WATER, LAND)

POLLUTANT: _____
QUANTITY: _____ UNIT: _____ (TONS OR POUNDS/YEAR)
PERCENT REDUCTION: _____
MEDIUM: _____ (AIR, WATER, LAND)

POLLUTANT: _____
QUANTITY: _____ UNIT: _____ (TONS OR POUNDS/YEAR)
PERCENT REDUCTION: _____
MEDIUM: _____ (AIR, WATER, LAND)

COMMENTS: _____

VI. SEP MILESTONES

13. MILESTONE DESCRIPTION: Completion of Project/Final Report Due
TARGET DATE: ____/____/____
REVISED TARGET DATE: ____/____/____
DATE MILESTONE ACHIEVED: ____/____/____

14. MILESTONE DESCRIPTION: _____

TARGET DATE: ____/____/____
REVISED TARGET DATE: ____/____/____
DATE MILESTONE ACHIEVED: ____/____/____

15. MILESTONE DESCRIPTION: _____

TARGET DATE: ____/____/____
REVISED TARGET DATE: ____/____/____
DATE MILESTONE ACHIEVED: ____/____/____

ATTACHMENT IV

SEP DATA FIELDS

Added METS Data Fields for SEPs

I. FACILITY INFORMATION

- Industrial Description (IND_DESC) - Description of the industrial source category (e.g. metal plating, paper coating)
- Standard Industrial Classification code (SICC) - Give SIC Code for the facility, not a range of codes.
- Type of Violation - Include statute and section, as well as brief description of violation.

II. SEP INFORMATION

- Type of pollution prevention project (SEP_TYPE) - Based on the national SEP policy, each pollution prevention project must fall into one of the following categories:
 1. pollution prevention
 2. pollution reduction
 3. environmental restoration
 4. environmental auditing
 5. public awareness programs
 6. donation to LEPC/SERC
- SEP project description (SEP_DESC) - Briefly describe the facility's SEP project (i.e., changing industrial processes, or substituting different fuels or materials).
- Associated media (ASS_MED) - Media affected by SEP (Air, Water, Land).
- Associated statute(s) (ASS_STAT) - Media program (FIFRA, CAA, TSCA, SPCC, etc.) to which SEP applies.
- Multi-media SEP (Y/N) - Answer "yes" if SEP (a) affects one or more media or (b) affects a media that is different from that which was the basis of the violation.

III. PENALTY INFORMATION

- Proposed Penalty Amount - Original penalty proposed in an administrative complaint.
- Adjusted Penalty Amount - The penalty resulting after all adjustments, e.g., for non-viable claims, good faith compliance

ATTACHMENT IV

and litigation risk, have been made.

- **Final Penalty Amount**- Cash portion of settlement penalty amount.

- **Penalty Due Date** - Date on which final penalty payment must be made.

IV. SEP COST/CREDIT INFORMATION

- **Initial SEP cost (INIT_COST)** - Quantify the initial capital cost to facility in implementing the SEP project.

- **Annual O&M cost (OM_COST)** - On-going annual Operation & Maintenance cost for SEP.

- **SEP credit (CREDIT)** - Amount by which the gravity-based portion of the penalty was reduced in consideration of the SEP.

- **Percent reduction** - Percentage by which the adjusted penalty was reduced as result of credit granted for the SEP.

- **Estimated pay-back period (PROJ_PB)** - Estimated amount of time it will take facility to recoup the cost of SEP through savings, tax benefits, etc., in years.

V. ENVIRONMENTAL BENEFIT

- **Media (MEDIA)** - Is the environmental benefit of SEP to the air, water, or land?

- **Pollutant (PPLT)**

- **Quantity (QTY)** - Quantity of reduction in emissions of pollutant or in usage of toxic chemical.

- **Unit (UNIT)** - Tons or pounds

- **Percent reduction (PCNT_RED)** of pollutant(s) - Percentage by which prior usage or emission of pollutant is reduced.

- **Comments (COMMENT)** - Brief description of the environmental benefit. Include substitute chemical, if any.

VI. SEP MILESTONES

- **Milestone description (DESCRIPT)** - At least one milestone should be the completion of the project. Also note any interim reports that must be submitted.

- **Target date (TARGET)** - milestone target date

- **Revised target date (REV_TARGET)**

- **Date milestone achieved (DTAC)**

ATTACHMENT V

CHECKLIST FOR OE CONCURRENCE ON SEPS
WITH A HORIZONTAL NEXUS TO THE VIOLATION

1. Into which of the six following eligible categories does the project fall?¹
 - A. Pollution prevention
 - B. Pollution reduction
 - C. Projects remediating adverse public health or environmental consequences
 - D. Environmental auditing projects
 - E. Enforcement-related environmental public awareness projects
 - F. Contingency planning/safety/emergency response donations
2. Does this project give the Respondent additional time to correct a violation or to come into compliance with existing requirements?
3. How is the nexus requirement met?
4. If any inter-Regional concurrence is necessary, has it been obtained? (Applies only to projects offering relief at different facilities.)
5. Was the project first proposed to EPA after the issuance of the complaint?
6. Will a substantial monetary penalty be collected?
7. Is the credit ratio you are offering more favorable to the Respondent than 2 to 1 for the proposed project (i.e., 1 to 1)?
8. Do Respondent's compliance history and resources indicate that it will successfully complete the SEP?

¹See pp. 2-4 of the Feb. 12, 1991 memo, "Policy on the Use of Supplemental Enforcement Projects in EPA Settlements", for descriptions of these categories.

APPENDIX: GUIDANCE AND OTHER DOCUMENTS RE: SEPs

5/28/92 EPA Definition of "Pollution Prevention" (F. Henry Habicht II, Deputy Administrator) (Attachment I)

2/25/91 Interim EPA Policy on the Inclusion of Pollution Prevention Provisions in Enforcement Settlements (James M. Strock, Assistant Administrator, Office of Enforcement)

2/12/91 Policy on the Use of Supplemental Environmental Projects in EPA Settlements (James M. Strock, AA, OE)

12/26/90 Adherence to CWA Penalty Policy and Special Documentation Requirements for Mitigation Projects (James Elder, Dir. Water Enforcement & Permits & Fred Stiehl, AE Counsel for Water)

11/3/89 Draft Guidelines for Evaluating Administrative Penalty Mitigation Projects (Edward Reich AAA, OE)

7/25/88 Guidance on Certification of Compliance with Enforcement Agreements (Thomas L. Adams, AA, OE)

10/28/86 GM-51: Guidance on Calculating After Tax Net Present Value of Alternative Payments (Thomas L. Adams, AA, OE)

2/16/84 GM-22: Agencywide Framework for Civil Penalties